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IN THE

Supreme Court of the United States

EM LTD. and NML CAPITAL, LTD.,

Petitioners,

—v.—

REPUBLIC OF ARGENTINA and BANCO CENTRAL DE LA REPÚBLICA ARGENTINA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPPOSITION OF RESPONDENT BANCO CENTRAL DE LA REPÚBLICA ARGENTINA TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether two Argentine "Decrees" allowing Argentina's central bank to use "unrestricted reserves" for a payment to the International Monetary Fund ("IMF"), without specifying or ordering which assets would be so used, constituted an "appropriation" by the Republic of Argentina of reserves held by the central bank in an account in its own name at the Federal Reserve Bank of New York so as to subject the reserves to attachment or execution by the Republic's creditors.

(2) Only if the Court reverses the Second Circuit's determination that there was no "appropriation" as a matter of New York and Argentine law would additional questions under the Section 1610 of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1610, be presented:

> (a) Whether the Second Circuit correctly held that proof of a "potential" use of property, without more, is insufficient to come within the exception to immunity for attachment or execution for sovereign property "used for" commercial activity in the United States under Section 1610.
>
> (b) Whether the Second Circuit correctly held that making a payment to the IMF is sovereign or governmental in nature, thus beyond the exception to immunity from attachment or execution for sovereign property used for "a commercial activity in the United States" under Section 1610.

(3) Whether a foreign sovereign's reserves in the United States that were otherwise used for central banking functions and immune from attachment or execution under the central bank/monetary authority exemption of the FSIA, 28 U.S.C. § 1611(b)(1), lost their immunity when the Argentine Decrees made those reserves more readily usable for a payment to the IMF.

(4) Whether the Second Circuit erred in affirming the district court's discretionary holding that petitioners were not entitled to any other discovery of respondent Banco Central de la República Argentina ("BCRA") -- a foreign sovereign entity presumed immune from jurisdiction and attachment under the FSIA -- because petitioners "failed to show a reasonable basis for assuming jurisdiction over BCRA."

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STATUTES AND RULES INVOLVED

In addition to the provisions included in the petition, the following statutes and rules are relevant in this proceeding:

28 U.S.C. § 1605(a) provides in relevant part:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case * * * (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

N.Y. C.P.L.R. 5201(b) provides:

> (b) Property against which a money judgment may be enforced. A money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested, unless it is exempt from application to the satisfaction of the judgment. A money judgment entered upon a joint liability of two or more persons may be enforced against individual property of those persons summoned and joint property of such persons with any other persons against whom the judgment is entered.

N.Y. C.P.L.R. 6202(b) provides in relevant part: "Any debt or property against which a money judgment may

be enforced as provided in section 5201 is subject to attachment."

Federal Reserve Regulation J, 12 C.F.R. § 210.25 and Appendix B provide in relevant part:

> (b) *Scope.* (1) This subpart incorporates the provisions of Article 4A set forth in appendix B to this subpart. * * *
>
> (2) Except as otherwise provided in paragraphs (b)(3) and (b)(4) of this section, this Subpart governs the rights and obligations of:
>
> (i) Federal Reserve Banks sending or receiving payment orders;
>
> (ii) Senders that send payment orders directly to a Federal Reserve Bank;
>
> (iii) Receiving banks that receive payment orders directly from a Federal Reserve Bank;
>
> (iv) Beneficiaries that receive payment for payment orders sent to a Federal Reserve Bank by means of credit to an account maintained or used at a Federal Reserve Bank; and
>
> (v) Other parties to a funds transfer any part of which is carried out through Fedwire to the same extent as if this subpart were considered a funds-transfer system rule under Article 4A.
>
> * * *

APPENDIX B TO SUBPART B OF PART 210--ARTICLE 4A, FUNDS TRANSFERS

Section 4A-103. *Payment Order--Definitions*

(a) In this Article:

* * *

(2) *Beneficiary* means the person to be paid by the beneficiary's bank.

(3) *Beneficiary's bank* means the bank identified in a payment order in which an account of the beneficiary is to be credited pursuant to the order or which otherwise is to make payment to the beneficiary if the order does not provide for payment to an account.

(4) *Receiving bank* means the bank to which the sender's instruction is addressed.

(5) *Sender* means the person giving the instruction to the receiving bank.

* * *

Section 4A-104. Funds Transfer--Definitions

In this Article:

* * *

(b) *Intermediary bank* means a receiving bank other than the originator's bank or the beneficiary's bank.

(c) *Originator* means the sender of the first payment order in a funds transfer.

(d) *Originator's bank* means (i) the receiving bank to which the payment order of the originator is issued if the originator is not a bank, or (ii) the originator if the originator is a bank.

* * *

Section 4A-503. Injunction or Restraining Order with Respect to Funds Transfer

For proper cause and in compliance with applicable law, a court may restrain (i) a person from issuing a payment order to initiate a funds transfer, (ii) an originator's bank from executing the payment order of the originator, or (iii) the beneficiary's bank from releasing funds to the beneficiary or the beneficiary from withdrawing the funds. A court may not otherwise restrain a person from issuing a payment order, paying or receiving payment of a payment order, or otherwise acting with respect to a funds transfer.

Excerpts from BCRA's Charter, Law 24,144 and from the Argentine Convertibility Law, Law 23,928, are reprinted at pages 7a -9a of Respondent's Appendix *infra*.

STATEMENT OF THE CASE

Petitioners -- two venturesome hedge funds -- seek to have this Court review the judgment of a panel of the Court of Appeals for the Second Circuit (Winter, J.; Cabranes, J.; Pooler, J.) affirming the vacatur of *ex parte* orders of attachment and restraining notices (the "Restraints") obtained to enforce judgments and would-be judgments against the sovereign Republic of Argentina (the "Republic" or "Argentina").

The opinions below properly found that petitioners were, in essence, barking up the wrong tree, because the Restraints were not issued against property of the Republic. Rather, the Restraints were issued against more than $100 million (the "Funds") in an account maintained by Banco Central de la República Argentina ("BCRA"), the Republic's central bank, at the Federal Reserve Bank of New York (the "FRBNY").* BCRA is not an obligor on the underlying bonds, and is not a party to the underlying dispute between the Republic and its creditors. The courts below made the dispositive factual and legal determination that the FRBNY Funds had always been, and remained, BCRA's property. In particular, the opinions below rejected petitioners' argument that two decrees issued on December 15, 2005 by Argentina's President (the

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* BCRA was designated an "interested non-party" in the courts below. Nevertheless, the court of appeals treated BCRA as an appellee in all respects, and BCRA is properly before this Court as a respondent. BCRA had and continues to have an interest in the decision on the petition equivalent to that of a respondent: BCRA contends, and petitioners contest, that the property that is the subject of the petition is BCRA's property and immune from attachment. Petitioners have consented to BCRA filing this brief as a respondent. Petition for a Writ of Certiorari ("Pet." or the "petition") at ii.

"Decrees") converted the FRBNY Funds into an attachable interest of the Republic. The Decrees permitted BCRA to use certain of its reserves to repay the Republic's debt to the International Monetary Fund ("IMF"), a multilateral lending agency. This is a fact-based determination of no significance beyond this case.

Although the determination that the FRBNY Funds remained BCRA's property at all relevant times was a sufficient ground to invalidate the Restraints, the courts below went on to hold that the FRBNY Funds would have been immune from attachment even if the FRBNY Funds were found to be the Republic's property. The courts held that the FRBNY Funds were not "used for a commercial activity in the United States" under the exception to immunity from attachment in aid of execution and pre-judgment attachment set forth, respectively, in § 1610(a) and § 1610(d) of the Foreign Sovereign Immunities Act of 1976 (the "FSIA"), 28 U.S.C. § 1610(a) and (d) (the "commercial-activity exception"), because (1) the FRBNY Funds were not actually used nor designated for use to repay the IMF debt, and (2) the repayment of IMF debt itself was not "commercial activity." Contrary to petitioners' claims of multiple "circuit conflicts," the Second Circuit explicitly followed the interpretation of the commercial-activity exception adopted by its sister circuits, including the Fifth Circuit, in reaching this conclusion.

The result below is further supported by the FSIA's express exemption from attachment or execution for property "of a foreign central bank or monetary authority held for its own account," 28 U.S.C. § 1611(b)(1) (the "central bank/monetary authority exemption"). While the Second Circuit ultimately did not rest its holding on this provision, the court noted that "there is little support for plaintiffs' [now petitioners'] arguments" that the Decrees removed the reserves from the protection of the exemption. Appendix to Pet. ("Pet. App.") 38a n.22. The central

bank/monetary authority exemption provides a separate and independent basis for vacating the Restraints, further making this case an inappropriate one for this Court's attention.[1]

Finally, petitioners seek review of the denial of discovery prior to the vacatur of the Restraints. Petitioners never served any discovery, however, and never raised any factual issues sufficient to overcome the presumptive immunity from discovery enjoyed by a nonparty sovereign instrumentality. As the court of appeals held, that discovery decision is properly the subject of the district court's discretion. It certainly is not one this Court should review.

A. Prior to the December 15, 2005 Decrees, the FRBNY Funds Were Concededly Owned by BCRA and Immune from Attachment.

BCRA is "a self-administered institution" created by Argentine law as a juridical entity separate and independent from the Republic's Executive Branch under a clause of the Argentine Constitution providing for the establishment of "a Federal bank with power to issue money." Const. Arg. art. 75 ¶6. *See also* Respondent Appendix ("Resp. App.") 7a (BCRA Charter). BCRA is managed by a board of directors appointed by the President of the Republic "in agreement with" the Senate. The board delegates oversight of BCRA's day-to-day activities to deputy managers. BCRA's core function is setting and executing monetary policy for the Republic.

As the FRBNY stated in a declaration submitted in support of BCRA in the trial court, many countries, attracted by "the safety and stability of the dollar and the United

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[1] "A respondent is entitled . . . to defend the judgment on any ground supported by the record." *Bennett* v. *Spear*, 520 U.S. 154, 166 (1997).

States' financial, political and judicial systems, . . . maintain part of their cash reserves in dollar-denominated assets in the United States" held in accounts "owned and controlled by the country's central bank." Resp. App. 25a-26a. BCRA has long maintained a portion of Argentina's reserves in BCRA's account at the FRBNY. There is no dispute that, prior to the Decrees, BCRA's reserves at the FRBNY were not subject to attachment to satisfy debts of the Republic. Indeed, as the court of appeals observed, petitioners conceded below that: "(1) before December 15, 2005 . . . the FRBNY Funds were the property of BCRA; (2) [petitioners] had no right to attach the FRBNY Funds before that date; and (3) even after issuance of the Decrees, the FRBNY Funds were held in BCRA's name." Pet. App. 18a.

B. Countries Commonly Repay Debts to the IMF with Central Bank Reserves.

As the court of appeals found, "central banks regularly execute transactions with the IMF on behalf of their parent governments," and "the vast majority of [IMF] members designate their respective central banks" as fiscal agent for IMF transactions. Pet. App. 38a n.22.[2] BCRA is

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[2] As of April 30, 2001, of 183 member countries of the IMF, 142, including Argentina, had designated their central bank as fiscal agent for purposes of dealing with the IMF. Treasurer's Department, International Monetary Fund, Pamphlet No. 45, *Financial Organization and Operations of the IMF* 84, 86 (6th ed. 2001); *see also* Derek Asiedu-Akrofi, *Central Bank Immunity and the Inadequacy of the Restrictive Immunity Approach*, 28 Can. Y.B. Int'l L. 264, 266 (1990) ("Despite the varying conditions under which central banks operate, most central banks perform similar functions. These functions include . . . acting as fiscal agents of member countries of the International Monetary Fund.").

among these countries. Under its Charter, BCRA is authorized to act "as a financial agent . . . , and as depository and agent for the [Republic] before international monetary, banking and financial entities, of which the Nation is a member." Resp. App. 8a; *see also id.* (authorizing BCRA to engage in "payment transactions derived from international agreements and borrow[ing] loans from foreign multilateral agencies and foreign instrumentalities, central banks or such entities of which the BCRA may solely be a borrower, on its behalf or on behalf of the National Treasury as the Argentine Republic's Financial Agent"). In its role as "financial agent" of the Republic, BCRA has been, at all relevant times, the entity through which the Republic borrows money from, and repays debt to, the IMF. Resp. App. 2a-3a.

C. The December 15, 2005 Decrees Merely Lifted Argentine Law Constraints that Had Limited BCRA's Ability to Use Its Reserves to Repay Argentina's IMF Financing.

Petitioners cast the Decrees as having "diverted" the FRBNY Funds from BCRA to the Republic. But BCRA always had used its reserves to pay principal and interest on Argentina's borrowings from the IMF. Resp. App. 3a. The Decrees lifted Argentine law provisions that had restricted BCRA's ability to use reserves to repay the Republic's debt to international lending authorities such as the IMF.

Under a law passed in January 2002, at the height of Argentina's fiscal crisis, all BCRA reserves had to be used to back the monetary base.[3] Resp. App. 4a, 9a, 15a. This meant that whenever BCRA used reserves to make a repayment to the IMF, the Republic was contemporaneously

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[3] The "monetary base" consists of the total amount of Argentine currency in circulation plus certain amounts deposited by financial entities in the central bank. Resp. App. 4a, 9a.

required to reimburse BCRA in an equivalent amount of Argentine pesos. *Id.* at 4a.

The first of the Decrees, Decree of Necessity and Urgency No. 1599/05, authorized BCRA to use reserves in excess of 100 percent of the monetary base (the "Unrestricted Reserves") to satisfy obligations to "international financial bodies." Pet. App. 131a-132a (Decree 1599/05, arts. 5, 6). Later that day, the Executive Branch issued Decree No. 1601/05, which authorized the Ministry of Economy and Production to direct BCRA to repay the full outstanding IMF debt, using an unspecified portion of the Unrestricted Reserves. Pet. App. 136a-138a. As BCRA's Argentine-law expert stated, "[t]hese modifications were simply designed to give the BCRA greater flexibility in the use of the reserves owned by it." Resp. App. 16a. Instead of reimbursing BCRA with pesos, the Republic provided BCRA with a 10-year interest-bearing non-transferable note to offset the reserves that would be used to repay the Republic's debt to the IMF. Pet. App. 145a (Resolution 49, art. 3).[4]

The next day -- prior to the service on BCRA of the Restraints and without notice of any attempt by petitioners to restrain BCRA's reserves in New York -- Pedro H. Rabasa, BCRA's Senior Manager of Foreign Exchange Reserves, supervised the transmission of orders to transfer funds from various BCRA accounts located outside New York. Resp. App. 12a. The payments to the IMF were made on January 3, 2006. *Id.* at 3a.

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[4] Petitioners argue that the issuance of this note shows that the payment to the IMF was not a use of funds for central banking purposes. Pet. 15. That is untrue. The Republic had always reimbursed its central bank for repayments of IMF lending, Resp. App. 3a, and petitioners concede that BCRA's reserves were not previously subject to attachment.

D. The Proceedings Below.

On Friday, December 30, 2005, petitioners obtained the *ex parte* Restraints based on a declaration that asserted -- falsely -- that the Decrees constituted an "appropriation" by the Republic of BCRA's reserves. Service of the Restraints on the FRBNY resulted in the temporary attachment of the approximately $105 million in reserves on deposit in BCRA's account at the FRBNY. On January 6, 2006, BCRA moved to vacate the Restraints.

On January 12, 2006, the district court (Griesa, J.) vacated the Restraints, concluding that (1) the Decrees did not create a "change in the property right situation" that would render BCRA's reserves attachable under New York law, Pet. App. 108a; (2) the payment to the IMF was governmental in nature and not subject to the FSIA's commercial-activity exception in any event, even if the Decrees had transferred BCRA reserves to the Republic, *id.*; and (3) the $105 million in the FRBNY account "was, is, and continues to be the property of the central bank used for central banking functions, and thus . . . the prohibition of Section 1611 on attaching those funds must apply." *Id.* at 109a. The court entered a formal order on January 24, 2006, but stayed the effect of that order pending an expedited appeal to the Second Circuit.

On appeal, the United States and the FRBNY each submitted briefs as *amici* in support of BCRA and the Republic. Pet. App. 14a. The United States in its brief and at oral argument argued, *inter alia*, that BCRA's repayment of IMF financing was not "commercial activity" within the meaning of Section 1610 of the FSIA because in receiving and discharging IMF lending Argentina "exercise[ed] powers only available to a sovereign and not any private player in the marketplace." The United States also argued that the Restraints, if permitted to stand, "would contravene important interests of the United States -- both in protecting the catalytic role of the . . . IMF . . . in the world financial

system, and in protecting the preeminence of the U.S. dollar as a reserve currency." The FRBNY argued that BCRA's account at the FRBNY was also exempt from attachment under Section 1611 as property "held for [BCRA's] own account." The FRBNY cited, *inter alia*, Federal Reserve Regulation J and Article 4A of the Uniform Commercial Code, pursuant to which, the FRBNY said, "the Republic has no attachable property interest in . . . BCRA's account at FRBNY."

On January 5, 2007, the Second Circuit affirmed the district court's vacatur order. In an opinion by Judge José A. Cabranes, the panel unanimously held that the Decrees transferred neither ownership nor control of the FRBNY Funds to the Republic. "[T]he FRBNY Funds continue to be owned by BCRA, a separate juridical entity from the Republic, and are not available to satisfy a judgment against the Republic." Pet. App. 4a. The Court noted that "[t]o conclude otherwise would be to allow creditors of a foreign state to attach all of the assets of the state's central bank any time the foreign state issues directives affecting the central bank's reserves." Pet. App. 21a.

The panel held in the alternative that "even if the funds were considered an attachable asset of the Republic," the commercial-activity exception would not permit attachment of the FRBNY Funds because (i) a "government's repayment of its debt to the IMF is not a 'commercial activity,'" and (ii) the FRBNY Funds were not "used for" repaying the IMF. *Id.* at 4a. The Second Circuit declined to reach the central bank/monetary authority exemption, but observed that "there is little support for plaintiffs' arguments" on this issue. *Id.* at 38a n.22. The court noted that "central banks regularly execute transactions with the IMF on behalf of their parent governments" and "the vast majority of [IMF] members designate their respective central banks" as fiscal agent for IMF transactions, which "would support the conclusion that even

if BCRA had decided to use the FRBNY Funds to repay the IMF, the funds would continue to be held for BCRA's 'own account.'" *Id.*

Finally, while noting that petitioners had not pointed to any formal requests for discovery, the panel found no abuse of discretion in Judge Griesa's refusal to grant petitioner EM Ltd.'s informal discovery request. *Id.* at 40a.

On January 19, 2007, petitioners asked the court of appeals for a rehearing and rehearing en banc. The panel denied the rehearing the request, and no active judge requested a vote on whether to rehear the panel's decision en banc. Pet. App. 114a, 116a, 118a.

REASONS FOR DENYING THE PETITION

The court of appeals' decision rests on three alternative holdings, all three of which must be subject to reversal and worthy of this Court's attention to merit a grant of certiorari that will have practical significance. *First*, in order to prevail, petitioners must demonstrate that the Decrees effected a transfer of ownership of the FRBNY Funds under Argentine and New York law; *second*, under 28 U.S.C. § 1610(a) and (d), if the Republic does in fact hold an attachable interest in the FRBNY Funds, petitioners must prove that *potential*, not actual, use of the FRBNY Funds to repay the IMF could satisfy the "used for" requirement of the commercial-activity exception; and *third*, even if mere potential use is sufficient, petitioners must show that the international treaty obligation to repay the IMF is a commercial activity within the meaning of § 1610(a) and (d). The Second Circuit correctly resolved each of these questions, and none provides a basis for certiorari.

The threshold issue to be resolved here is the meaning -- under Argentine law -- of two Argentine Decrees. The district court looked closely at the language of each of the Decrees, *see* Pet. App. 51a-69a, and the Second Circuit affirmed its conclusion that "the title [of the reserves]

should be regarded as not changed," *id.* at 108a. The fact that, in order to reach any of the other of the petitioners' proposed questions under the FSIA, the Court would have to decide an issue that is ultimately a matter of Argentine law is in itself reason to deny the petition.

Even if there had been a transfer in ownership of the FRBNY Funds, the Second Circuit's conclusion that these assets were not "used for" a commercial activity because they were not used, or designated for use, for the claimed activity, was a fact-bound determination decided under standards on which, contrary to petitioners' contention, there is no conflict among the lower courts.

Likewise, the question whether payment to the IMF pursuant to treaty constitutes a "commercial activity" is one on which no other circuit court has had an opportunity to opine and on which there is no circuit split. The Second Circuit applied the test set forth in this Court's opinion in *Republic of Argentina* v. *Weltover*, 504 U.S. 607 (1992), and petitioners agree that that test applies. Petitioners dispute only the application of the test to a particular set of facts.

Moreover, that question is ultimately of no moment, because the record clearly shows that a payment to the IMF is a traditional central banking function, so that the reserves are protected in any event by the central bank/monetary authority exemption under § 1611(b)(1) of the FSIA. Although the court below did not reach this issue, it is an argument properly raised by respondents that provides yet another basis for denying the petition.

Finally, the Court should not spend its scarce resources to review petitioners' discovery request, which is based on an inadequate record in any event. The trial court's discovery ruling is a discretionary, fact-bound application of well-settled principles.

I. The Petition Should Be Denied Because the Second Circuit Properly Concluded, as a Matter of New York State and Argentine Law, that Two Argentine Decrees Did Not Transfer Property Rights in BCRA's Reserves, a Question that Is Entirely Fact-bound.

The threshold issue in this case is whether the Decrees transferred the FRBNY Funds, which prior to December 15, 2005 concededly were BCRA's property, to the Republic. If that question is answered in the negative, as the courts below held, this Court would never reach petitioners' arguments regarding the application of the FSIA's commercial-activity exception, which depend on petitioners first showing that the Republic had an attachable interest in the FRBNY Funds.

Supreme Court Rule 10 states, "a petition for a writ of certiorari will be granted only for compelling reasons" and "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." There is no compelling reason to review the Second Circuit's ruling that, as a matter of New York and Argentine law, the Decrees neither transferred ownership of the FRBNY Funds to the Republic nor made the FRBNY Funds an attachable interest of the Republic. In any event, that ruling was clearly correct, and petitioners do not now, and did not below, point to *any* legal authority supporting a contrary conclusion.

A. The Decrees Did Not, Under Argentine Law, Transfer Any Ownership Interests in the FRBNY Funds.

Petitioners have never seriously contended that the language of the Decrees evidences a transfer of ownership rights in the reserves to the Republic. BCRA submitted a declaration by Gustavo Gerscovich, an Argentine law professor and former legal manager at the central bank.

Professor Gerscovich opined that nothing in the Decrees or any other Argentine law "indicates . . . that the BCRA's ownership of its reserves is altered in any way." Resp. App. 16a. Petitioners presented no contrary opinion of Argentine law.[5] Thus, the courts below found that, as a matter of Argentine law, the Decrees did not transfer foreign reserves held by BCRA, including those held in the FRBNY account, to the Republic. Pet. App. 18a-19a ("Plaintiffs do not . . . point to any order or other document explicitly transferring ownership of the FRBNY Funds from BCRA to the Republic."). The petition does not dispute that finding.

B. Under New York Property and Banking Law, the Funds in the FRBNY Account Belong to BCRA.

Petitioners also do not articulate a coherent theory for how the Decrees effected a transfer of an attachable ownership interest in the FRBNY Funds under New York law.[6] Under New York Civil Practice Law and Rules ("C.P.L.R.") 5201(b), "[a] money judgment may be enforced against any property which could be assigned or transferred." *See also* C.P.L.R. 6202 (only "property against which a money judgment may be enforced as provided in

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[5] Petitioners submitted a declaration of an Argentine lawyer that merely recited the history of the Decrees and explained the term "freely available reserves." The declaration said nothing about the effect of the Decrees on the ownership or control of the FRBNY Funds. Resp. App. 17a-21a.

[6] Federal Rule of Civil Procedure 69 incorporates New York state law. "The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice of the state in which the district court is held . . . ." Fed. R. Civ. P. 69. Federal Rule of Civil Procedure 64 similarly incorporates New York state law regarding pre-judgment attachment.

section 5201 is subject to attachment"). "[A] party cannot reach assets in which the judgment debtor has no interest." *Karaha Bodas Co.* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F. 3d 70, 83 (2d Cir. 2002). "A determination of [the Republic's] property interest in the disputed funds -- *i.e.*, whether [the Republic] can 'assign or transfer' any of these funds -- is therefore dispositive . . . ." *Id.*

The court of appeals held that "[w]hile the Decrees may have manifested the Republic's ability and willingness to control BCRA, and to direct BCRA to use its assets for the benefit of the Republic," the Decrees left to BCRA's discretion "the decision of which specific funds would be used." Pet. App. 21a. As a consequence, the Decrees "did not cause control of BCRA's assets to change from BCRA to the Republic." *Id.*

That holding, which applies Argentine and New York law to a particular factual setting, stands on three independent grounds.

First, after the Decrees were issued, the FRBNY Funds remained in an account in BCRA's own name, which gives rise to a presumption of ownership under New York law. *See Karaha Bodas*, 313 F. 3d at 86 ("Under New York law, the party who possesses property is presumed to be the party who owns it. When a party holds funds in a bank account, possession is established, and the presumption of ownership follows."); *see also Perkins* v. *Guaranty Trust Co. of New York*, 274 N.Y. 250, 261, 8 N.E.2d 849, 853 (1937) (possession of stock certificates in holder's own name created presumption of ownership); *In re Kolodziejczyk* v. *Wing*, 261 A.D.2d 927, 928, 689 N.Y.S.2d 825, 825 (1999) (bank account statement listing joint owners created presumption of joint ownership); *Pollock* v. *Rapid Indus. Plastics Co.*, 113 A.D.2d 520, 525, 497 N.Y.S.2d 45, 49 (1985). Petitioners offered no authority to overcome the

presumption that BCRA owns the assets held in a New York bank account in BCRA's name.

Second, under fundamental banking law principles, a depositor of a bank has no right to assign or transfer the bank's property held at another bank. A positive balance in a bank account reflects "a promise to pay, from the bank [here, FRBNY], to the depositor [BCRA]." *Citizens Bank of Maryland* v. *Strumpf*, 516 U.S. 16, 21 (1995). As the FRBNY Funds are held solely in BCRA's name, the FRBNY owes a debt with respect to those funds only to BCRA. *See Dakin* v. *Bayly*, 290 U.S. 143, 146 (1933) (deposit of funds creates a debtor-creditor relationship between bank and its customer). Thus, a BCRA depositor, such as the Republic, cannot assign or direct the transfer of BCRA's account at the FRBNY. The FRBNY could only pay out on the instructions of BCRA, not the Republic. *See Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Chemical Bank*, 57 N.Y.2d 439, 444, 442 N.E.2d 1253, 1256 (N.Y. 1982) (implicit in the bank-customer relationship is "the understanding that the bank will pay out its customer's funds only in accordance with the latter's instructions"); *Bradford* v. *Chase Nat'l Bank of City of New York*, 24 F. Supp. 28, 38 (S.D.N.Y. 1938) ("[T]he person in whose name the account stands has absolute control of it."), *aff'd sub nom. Berger* v. *Chase Nat'l Bank of City of New York*, 105 F.2d 1001 (2d Cir. 1939), *aff'd*, 309 U.S. 632 (1940).

Third, even if BCRA, pursuant to a directive from the Republic, had in fact ordered the FRBNY to transfer some or all of the FRBNY Funds to the IMF -- which it did not do -- petitioners still could not have attached the funds by levying on the FRBNY. Such a transfer would have to be made via the Fedwire, and under Federal Reserve Regulation J, 12 C.F.R. § 210.25, and Article 4A of the Uniform Commercial Code ("U.C.C.") incorporated by reference into Regulation J, a creditor of the originator of a Fedwire funds transfer -- here, the Republic -- may not

attach or restrain funds in the hands of a beneficiary's bank or intermediary bank -- here, FRBNY -- in order to collect a debt owed by the originator. U.C.C. 4A-103, 104. Such a creditor may only serve such a restraint on BCRA (the originator's bank), U.C.C. 4A-503, which in this case is located in Argentina.[7] In other words, an order by a depositor to its bank to pay a third party does not, as a matter of New York and federal banking law, turn the bank's funds into the depositor's and make them available for attachment by the depositor's creditors. As the Official Commentary to the U.C.C. explains, creditors of an originator of a payment order cannot reach an account at an intermediary or receiving bank such as, here, the FRBNY, because "no property of the originator is being transferred." U.C.C. 4A-502 cmt. 4.

Furthermore, the Second Circuit's conclusion that the Decrees did not effect a transfer of property rights to BCRA's depositor, the Republic, is supported by sound policy. As that court held, petitioners' argument would "allow creditors of a foreign state to attach all of the assets of the state's central bank any time the foreign state issues directives affecting the central bank's reserves." Pet. App. 21a. National governments typically retain the ability to direct their central banks to act with respect to foreign exchange reserves. M.H. de Kock, *Central Banking* 34-37, 312-18 (4th ed. 1974). As the Second Circuit further observed, Pet. App. 21a n.12, the United States has repeatedly directed the Federal Reserve Banks to transfer

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[7] A New York court's attachment order reaches only those assets located in New York. *See In re Nat'l Union Fire Ins. Co of Pittsburgh, Pa.* v. *Advanced Employment Concepts, Inc.*, 269 A.D.2d 101, 101, 703 N.Y.S.2d 3, 4 (2000) ("In order to be subject to attachment, property must be within the court's jurisdiction.").

"surplus funds . . . to the Secretary of the Treasury for deposit in the general fund of the Treasury." 12 U.S.C. § 289(b)(1).

Petitioners respond that this concern was exaggerated, because their argument is limited to a directive "to *repay a nation's external debt.*" Pet. 13 (emphasis in original). Petitioners also assert that their theory would not affect directives to use central bank assets "for *governmental* activities," but that the Decrees made the FRBNY Funds available for a "commercial" function. *Id.* (emphasis in original). But petitioners here are muddling their arguments under Section 1610 -- when a sovereign's own assets are subject to attachment -- with the property-law point -- which is that the FRBNY Funds were never the sovereign's property. There is nothing about the Second Circuit's conclusion under Argentine and New York law that turns on what the funds were to be used for, nor is there anything in New York or Argentine law that suggests that the purpose of a funds transfer affects the question of who owns a bank's assets.

C. Under Corporate Law Principles Also, the Republic Does Not "Own" the Assets of a Wholly-Owned Instrumentality, and Plaintiffs in the Court Below Waived Any Arguments that the Republic Abused the Corporate Form.

Petitioners also assert that the Second Circuit improperly invoked "corporate law principles" in concluding that the Decrees did not transform the FRBNY Funds into the assets of the Republic. Pet. 14-15. The Second Circuit's point was that the fact that the Republic could control its "subsidiary" BCRA, and direct BCRA to use its assets for the benefit of the Republic -- its "parent" -- would not, under ordinary corporate law principles, turn the subsidiary's assets into assets of the parent. This was clearly a correct conclusion. *See Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 475 (2003) ("A corporate parent which owns the shares of a

subsidiary does not, for that reason alone, own or have legal title to the assets of the subsidiary . . . . The fact that the shareholder is a foreign state does not change the analysis."); *United States* v. *Wallach*, 935 F.2d 445, 462 (2d Cir. 1991) ("[S]hareholders do not hold legal title to any of the corporation's assets. Instead, the corporation -- the entity itself--is vested with the title."); 1 William Meade Fletcher, *Encyclopedia of the Law of Corporations* § 31 at 78, 84 (rev. ed. 2006) ("Shareholders, even the controlling shareholder, cannot transfer or assign the corporation's properties and rights, nor apply corporate funds to personal debts or objects.").

Petitioners' argument that in fact Argentina abused the corporate form by directing BCRA to pay the Republic's debt, Pet. 14-15, is an argument that petitioners explicitly disavowed in the court below. As the Second Circuit's opinion states, petitioners "expressly elected not to argue in support of attachment that BCRA's separate juridical status should be disregarded because BCRA is the alter ego of the Republic." Pet. App. 27a-28a. Petitioners may not attempt to resurrect that argument now. *See, e.g.*, *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 194 n.13 (1976) (refusing to address a claim not raised in lower courts); 23 MOORE'S FEDERAL PRACTICE – CIVIL § 510.41 (3d ed. 2007) ("As a rule, the Court will not grant certiorari to decide an issue that was not raised in the proceedings below -- irrespective of its general significance or novelty.").[8]

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[8] On September 25, 2006, after oral argument in the Second Circuit, petitioners in fact brought a new lawsuit seeking a declaration that BCRA is the alter ego of the Republic, and moved in that action and in the present one for new orders of attachment and restraining notices on the FRBNY Funds on an alter ego theory. Those motions are pending in the district court.

The Second Circuit properly concluded that the Decrees did not turn BCRA's assets into assets of the Republic. That determination depends on the particular effect of the Decrees and on New York property law. It is completely correct as a matter of standard banking law principles. There is no reason for the Court to review that question, yet the petition depends entirely on the cert-worthiness of that issue. If the FRBNY Funds remained BCRA's property after the Decrees, the Court would never reach the commercial-activity questions under the FSIA, which are the first two of petitioners' proposed questions for review, and to which we turn next.

II. No Circuit Has Accepted Petitioners' Argument that Assets that Could Be Used for Commercial Activity Were So Used, and There Is No Circuit Split on this Point.

The Court further should deny the petition because the Second Circuit correctly determined, under standards on which there is no circuit conflict, that even if the Republic had an attachable interest in the FRBNY Funds when they were attached on December 30, 2005, the funds were immune under the FSIA. Section 1609 of the FSIA, 28 U.S.C. § 1609, provides that the property of a foreign sovereign is immune from execution and attachment, unless an exception applies under 28 U.S.C. § 1610. Thus, treating the FRBNY Funds as the Republic's -- which they are not, and never were -- gets petitioners only as far as the commercial-activity exception. Pursuant to § 1610(a), a foreign state may effectively waive immunity from attachment in aid of execution, but only as to its property in the United States that is "used for a commercial activity in the United States." 28 U.S.C. § 1610(a). Section 1610(d) applies a similar rule to the waiver of immunity from pre-judgment attachment. 28 U.S.C. § 1610(d).

The court below concluded that the FRBNY Funds were neither actually used, nor designated for use, for the

supposed commercial act -- payment to the IMF -- identified by petitioners. Pet. App. 36a-37a. This limited holding -- the court of appeals specifically declined to "define the precise contours of 'used for' within the contemplation of § 1610," *id.* -- is a fact-based application of § 1610.

Petitioners argue that the Second Circuit's decision conflicts with the Fifth Circuit's holding in *Af-Cap Inc.* v. *Republic of Congo*, 383 F.3d 361, 370 (5th Cir. 2004). Pet. 23-25. But the opinion below expressly relies on *Af-Cap* and other Fifth Circuit cases. Pet. App. 36a-37a. Petitioners find a conflict only by ripping out of context a phrase in the Fifth Circuit's opinion in *Af-Cap* and treating it as the central holding.

The Fifth Circuit in *Af-Cap* explained at some length that in determining whether property is "used for" commercial purposes, the object is to determine "the predominant or essential use of the property in question" by looking both to past uses and to contemplated uses. *Af-Cap*, 383 F.2d at 368-69. The court found that the funds in question in that case had previously been used for commercial activity in a "continuing, extended, and monetarily significant" manner and that the sovereign had "contemplated engaging in the same type of use again." *Id.* at 370. In explaining its reference to "contemplated use," when the test is whether the assets are actually being "used for" commercial purposes, the Fifth Circuit made the following comment:

> "Although such contemplated use is not actual use, it is strongly suggestive that [the funds at issue] were not cordoned off for use of the Congo in its sovereign capacity."

Id. at 370.

Ignoring the first part of this remark, petitioners argue that the Fifth Circuit actually required the sovereign to

show that the funds were "cordoned off for use of the [foreign state] in its sovereign capacity," and that the Second Circuit's holding is inconsistent with such a test. Pet. 23. But in fact the Second Circuit looked to precisely this sentence, and noted, "[e]ven if actual use were not required, at least specific designation for such use would be necessary." Pet. App. 37a. This was completely consistent with the Fifth Circuit's holding and reasoning. No court has required that the sovereign instrumentality show that assets have been "cordoned off." Rather, the circuits that have decided this issue look to whether the assets are in fact being used for commercial purposes. *See Af-Cap, Inc.* v. *Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1091 (9th Cir. 2007) ("Like the Fifth Circuit, we conclude that property is 'used for a commercial activity in the United States' when [it] is put into action, put into service, availed or employed for a commercial activity . . . .") (emphasis omitted); *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran* v. *Cubic Def. Sys., Inc.*, No. 03-55015, 2007 U.S. App. LEXIS 12434, at *30-*31 (9th Cir. May 30, 2007) (same).

Here, before the Decrees, the FRBNY Funds were concededly not subject to attachment. Indeed, the record shows that the Funds were comprised of (1) reserve deposits that Argentine banks are required by Argentine law and BCRA regulations to make into BCRA's FRBNY account and (2) foreign exchange reserves used by BCRA in foreign exchange transactions to implement monetary policy. Resp. App. 6a-7a. As the Second Circuit found, the Decrees did not designate the Funds for payment to the IMF. Pet. App. 37a. The Decrees merely made the Funds -- along with every other dollar, yen or pound of BCRA reserves around the world -- potentially available for that use. Based on these facts, the Fifth Circuit certainly would have arrived at the same result.

Petitioners' position -- adopted by no court anywhere -- is that because the FRBNY Funds were potentially available for the repayment of the Republic's debts, they were so used. But this effectively reads the "used for" test out of the statute and collapses the clear statutory distinction between the tests for attachment of assets of a sovereign and for attachment of assets of a sovereign instrumentality. Under § 1610(a) -- the statute applicable here, under petitioners' theory -- the assets of a foreign state in the United States are subject to attachment only if they are used for a commercial activity in the United States (and one of the other tests of that section, such as waiver, are met). In contrast, under § 1610(b), all the assets of a sovereign instrumentality are subject to attachment if the instrumentality is engaged in commercial activity in the United States (and either there has been a waiver or "the judgment relates to a claim for which the . . . instrumentality is not immune"). 28 U.S.C. § 1610(b)(2).

By reading "used for" commercial activity to mean "potentially used for" commercial activity, petitioners would subject to attachment virtually all the assets of a foreign sovereign -- and certainly all the cash or liquid assets -- if the sovereign engaged in any commercial activity anywhere. That is not the proper test and adopting it would nullify the distinction between sovereigns, on the one hand, and their instrumentalities, on the other, that Congress painstakingly adopted when it enacted the FSIA.[9] Petitioners' argument that there should be a better way for creditors to attach the

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[9] The applicable provisions of the FSIA -- namely, 28 U.S.C. § 1610(a) and (d) -- codified years of U.S. foreign relations law and were the product of substantial deliberations in both Houses, with input from the Executive Branch. *See, e.g.*, H.R. Rep. 94-1487, at 9-10 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6607-08 (hereinafter "House Report").

immune assets of a foreign sovereign is an argument that should be made to the legislature, not the judiciary.

III. The Second Circuit Properly Concluded that Repayments of IMF Lending Are Not a Commercial Activity Within the Meaning of the FSIA, and There Is No Circuit Split on the Issue.

Even if the Decrees transferred an attachable property interest in the FRBNY Funds to the Republic *and* the Unrestricted Reserves were "used for" the repayment to the IMF, such use still would not constitute "commercial activity" within the meaning of 28 U.S.C. § 1610(a) and (d). Petitioners assert that the Second Circuit's decision is "out of step" and "chafes against" -- even petitioners do not claim a true conflict -- decisions of this Court and of other circuits. Pet. 16. Petitioners say these other cases proceeded at a higher "level of generality" in analyzing whether the sovereign aspects of conduct were sufficiently prominent to make the activity non-commercial. Pet. 16-17. But none of the cases petitioners cite -- or any other case of which we are aware -- considered payments to or from the IMF. The cases plaintiffs point to concern very different factual scenarios, and petitioners' analysis of the "level of generality" applied is a completely subjective categorization. Conflict here apparently is in the eye of the beholder.

Moreover, all nine of the decisions that petitioners cite as inconsistent with the Second Circuit's decision arise under a different section of the FSIA -- namely, 28 U.S.C. § 1605, which provides:

> A foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case--
>
> in which the action is *based upon* a commercial activity carried on in the United States by the foreign state; or upon an act

> performed in the United States *in connection with* a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States *in connection with* a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2) (emphasis added). That section requires only that a suit be "based upon" or "in connection with" commercial activity, rather than the much closer connection required by the attachment statute, § 1610. Pet. 16. Thus, the commercial element in the activity may be far more incidental and yet be sufficient to support jurisdiction under § 1605 than where the assets in question must be "used for" a commercial purpose under § 1610.[10] There is no conflict whatsoever -- and plaintiffs do not claim there is one -- with respect to cases under § 1610.

In any event, petitioners do not take issue with the test applied by the Second Circuit -- that is, whether the state was exercising "powers peculiar to sovereigns" as opposed to "powers that can also be exercised by private citizens." Pet. App. 32a (quoting *Weltover*, 504 U.S. at 614 (internal quotation marks and citations omitted)). This Court should not spend its time on the allegedly improper application of

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[10] *Af-Cap* v. *Chevron*, 475 F.3d at 1087 ("[T]he phrase 'used for' in § 1610(a) is not a mere syntactical infelicity that permits courts to look beyond the 'use' of property, and instead try to find any kind of nexus or connection to a commercial activity in the United States."); *id.* at 1090 ("[I]f Congress had intended to equate 'used for' with 'integral to' or 'related to,' Congress likely would have used the phrase 'in connection with,' as it did in § 1605."); *Connecticut Bank of Commerce* v. *Republic of Congo*, 309 F.3d 240, 255 (5th Cir. 2002).

the concededly correct standard where there is no circuit conflict on the application or the standard.

Moreover, petitioners are wrong in their claim of error. The activity examined in *Weltover* was the issuance of, and default on, government bonds. In holding that the lawsuit was based upon an act in connection with commercial activity, the Court rested on the fact that the bonds were "garden-variety debt instruments." *Id.* at 615. The Court identified the bonds' three commercial characteristics: "[i] They may be held by private parties; [ii] they are negotiable and may be traded on the international market (except in Argentina); and [iii] they promise a future stream of cash income." *Id.* Thus, there was "nothing about the issuance of these [bonds] (except perhaps its purpose) that is not analogous to a private commercial transaction." *Id.* at 616.

In the present action, unlike the *Weltover* bonds, there is not a single similar element of the IMF payment that *is* analogous to a private commercial transaction:

- Private parties cannot borrow from the IMF. IMF financing is available only to sovereign nations. Second Amendment of Articles of Agreement of the IMF ("IMF Agreement"), Apr. 30, 1976, arts. II & V, 29 U.S.T. 2203.

- Only sovereigns have the power to carry out the terms of IMF financing, which typically requires the member nation to implement economic reforms. IMF Agreement art. IV, §§ 1, 3; IMF Lending, http://www.imf.org/external/np/exr/facts/howlend.htm (last visited June 26, 2007); *see also* Sandra Blanco & Enrique Carrasco, *The Functions of the IMF and the World Bank*, 9 Transnat'l L. & Contemp. Probs. 67, 75 (1999) (the IMF requires "explicit commitment by the [IMF] member country to implement remedial measures in return for IMF assistance . . . . Those measures

typically have related to the domestic money supply, budget deficits, international reserves, external debt, exchange rates, and interest rates"). As the Second Circuit found, "the IMF's borrowing program is part of a larger regulatory enterprise intended to preserve stability in the international monetary system and foster orderly economic growth." Pet. App. 33a.

- A member country's obligation to repay IMF financing is not governed by a "garden-variety debt instrument" or any other type of commercial contract, but rather constitutes an international treaty obligation that member nations assume upon joining the IMF. IMF Agreement art. V § 7.

- Failure to comply constitutes a breach of the member's treaty obligations, for which the penalties include ineligibility to use IMF resources, suspension of voting rights, and ultimately the potential for expulsion from the IMF. IMF Agreement art. XXVI § 2.

- As the Second Circuit also found, "a nation state's borrowing relationship with the IMF takes place outside of the commercial marketplace." Pet. App. 36a. Whereas the typical commercial borrower obtains currency in exchange for a debt instrument, an IMF member nation purchases so-called "Special Drawing Rights" -- a reserve asset unique to the IMF and unavailable to the private sector -- or freely usable currency of other member countries in exchange for its own currency. IMF Agreement art. V. Similarly, repayment to the IMF is actually the debtor nation repurchasing its own currency. *Id.*

Moreover, petitioners' argument that all borrowing is commercial leans heavily upon a single sentence in the legislative history that includes "borrowing of money" among a list of generic examples of "commercial activity." Pet. 20-21. But the preceding paragraph makes clear that the

House Report was not suggesting that all borrowing would be "commercial." It says "a foreign state's mere participation in a foreign assistance program administered by the Agency for International Development (AID) is an activity whose essential nature is public or governmental, and it would not itself constitute commercial activity." House Report at 16. AID's statutory authority has always included loan programs. *See* Foreign Assistance Act of 1961, Pub. L. No. 87-195, § 635(b), *codified at* 22 U.S.C. § 2395(b).[11] Likewise, IMF financing -- the means by which the international community works to avert or resolve balance of payment crises that threaten the global economy -- is quintessentially sovereign in nature.

IV. The Court Should Deny the Petition Because BCRA's Reserves Are Central Bank Assets Immunized Under § 1611(b)(1).

The Court also should deny the petition because there is an alternative ground for affirmance properly raised before, but not reached by, the court of appeals. Pet. App. 38a n.22. Section 1611(b)(1) of the FSIA provides that property of a foreign state that is otherwise subject to attachment or execution under § 1610 "shall be immune from attachment and from execution, if . . . the property is that of a foreign central bank or monetary authority held for

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[11] Similarly, the House Report makes clear that in dropping a "public debt" immunity provision from the bill, Congress had in mind routine sales of bonds or borrowing from a commercial bank -- the activity at issue in *Weltover* -- and not borrowing from other sovereigns or international organizations such as the AID program or the IMF. House Report at 10 ("[B]oth *a sale of bonds to the public* and *a direct loan from a U.S. commercial bank* to a foreign government are activities which are of a commercial nature and should be treated like other similar commercial activities.") (emphasis added).

its own account." 28 U.S.C. § 1611(b). Relying on the legislative history of the provision, every court to have considered the term has held that property is held for a central bank's "own account" if it is "used or held in connection with central banking activities, as distinguished from funds used solely to finance the commercial transactions of other entities or of foreign states." House Report at 31; *see Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran* v. *Cubic Def. Sys., Inc.*, 385 F.3d 1206, 1223 (9th Cir. 2004); *Banco Central de Reserva del Peru* v. *Riggs Nat'l Bank*, 919 F. Supp. 13, 17 (D.D.C. 1994); *Weston Compagnie de Fin. et d'Investissement, S.A.* v. *La República del Ecuador*, 823 F. Supp. 1106, 1113 (S.D.N.Y. 1993).

The record shows that the FRBNY Funds were used for traditional central banking functions: foreign exchange transactions to stabilize the domestic currency, and maintaining the reserve requirements of Argentina's domestic depository institutions. Resp. App. 6a-7a. While these reserves were not used to repay the IMF, even if they had been, that is a quintessential central banking activity. The vast majority of IMF members have designated their central bank as the country's fiscal agent for its transactions with the IMF. *See* sources cited *supra* at 4 n.2. Repaying IMF lending, or intermediating such repayment, is thus overwhelmingly regarded as a central banking function.

Where "there [are] other legal grounds for affirmance that demonstrate that the decision below is correct regardless of how the Court resolves the questions presented," a grant of certiorari is ill-advised. Robert L. Stern *et al.*, *Supreme Court Practice* 457 (8th ed. 2002). Here, regardless of whether or not the Second Circuit was right on its property or "commercial activity" holdings, the Restraints here would fail because of the central bank/monetary authority exemption.

V. There Is No Reason for This Court to Review the District Court's Denial of Discovery.

There is no reason for the Court to review the Second Circuit's conclusion that petitioners were "not entitled to any other discovery" because they "failed to show a reasonable basis for assuming jurisdiction over BCRA." Pet. App. 40a (internal quotation marks omitted). The decision to grant or deny discovery is purely discretionary and often (as is the case here) based on specific factual determinations. The standard for allowing discovery of sovereigns prior to a finding that the court has jurisdiction under the FSIA is well settled in the lower courts, and even petitioners do not suggest there is difference of opinion on the question.[12] Pet. 26-27. The trial court and court of appeals correctly applied that standard in concluding that petitioners were not entitled to, nor would they be aided by, any further discovery of BCRA. *See* Sup. Ct. R. 10 (a petition "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law").[13]

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[12] *First City, Texas-Houston, N.A.* v. *Rafidain Bank*, 150 F.3d 172, 176 (2d Cir. 1998) ("[D]iscovery should be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination."); *Af-Cap* v. *Chevron*, 475 F.3d at 1095-96 (same); *Arriba Ltd.* v. *Petroleos Mexicanos*, 962 F.2d 528, 534 (5th Cir. 1992) (same).

[13] BCRA also joins in the arguments on this point made in the Republic's brief in opposition to the petition.

CONCLUSION

For the reasons discussed above, the Court should deny the petition.

Respectfully submitted,

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